IN THE

Supreme Court of the United States

October Term, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,

Petitioner,

v.

MIDCAL ALUMINUM, INC.,

Respondent,

BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

MOTION OF CONSUMERS UNION OF UNITED STATES, INC., FOR LEAVE TO FILE A BRIEF AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION OF CONSUMERS UNION OF UNITED STATES, INC., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 42 of this Court, for leave to file the accompanying brief *amicus curiae* in support of respondent Midcal Aluminum, Inc. ("Midcal"). Both Midcal and

respondent Baxter Rice have consented to the filing of this brief, but petitioner has refused to do so.[1]

Interest of Amicus Curiae

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes *Consumer Reports,* a monthly magazine with a circulation of over 2 million, which regularly carries articles rating products that Consumers Union has tested, as well as articles on consumer services, marketplace economics and judicial actions that affect consumer welfare. Approximately 300,000 residents of California subscribe to *Consumer Reports.*

Since its earliest days, Consumers Union has opposed laws that permit or require resale price maintenance, or "fair trade." Pursuant to this long-standing policy, Consumers Union sought and was granted leave early in 1977 to participate as *amicus curiae* in *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431 (1978). Attorneys representing Consumers Union prepared briefs and participated in oral argument of that case in both the California Court of Appeal and the California Supreme Court.

Consumers Union seeks leave to participate in this case because of its belief that *Rice v. Alcoholic*

[1]The attorneys for Midcal gave their consent in a letter dated November 28, 1979. The attorney for respondent Rice gave his consent in a letter dated December 7, 1979. Both of these letters have been filed with the Clerk of this Court pursuant to Rule 42(2).

Beverage Control Appeals Board was correctly decided, and because — as conceded by both petitioner and *amicus curiae* the California Attorney General — this case is little more than a collateral attack on *Rice.*

The decision in *Rice* has been important to Consumers Union in four respects. First, of course, it was consistent with the long-standing opposition to "fair trade" laws noted above. Second, although the precise amount is hard to measure, the *Rice* decision has saved California consumers millions of dollars in the purchase of alcoholic beverages. Third, Consumers Union has been involved in other litigation (such as challenges to anticompetitive professional rules) in which parties sometimes contend that state law compels them to engage in anticompetitive acts, and that they are therefore entitled to invoke the "state action" exemption established by *Parker v. Brown,* 317 U.S. 341 (1943), even though there is no independent review by the State of their conduct. *Amicus* believes that any retreat from *Rice's* holding on this question would significantly interfere with the proper application of the federal antitrust laws.

Finally, *amicus* wishes to defend the *Rice* Court's holding that state liquor legislation in conflict with the Sherman Act does not automatically prevail over that federal statute, but must be balanced against it to determine in each particular case which law should give way. Questions about the extent of California's power to enact anticompetitive liquor legislation have arisen frequently since 1978, as the California Legislature has considered a number of bills introduced in response to *Rice.* Consumers

Union has opposed those bills which attempted to reinstitute price fixing for alcoholic beverages. A ruling from this Court affirming that the States must take the federal antitrust laws into account when they legislate with respect to liquor will help to insure continuation of the much-needed competition that has developed in the California liquor market since *Rice.*

Facts and Questions Presented by Amicus Curiae

Although Consumers Union is confident that respondent Midcal will ably defend the ruling below, the accompanying brief should be accepted because it presents relevant facts and legal argument that may not otherwise be brought to the Court's attention. In particular, *amicus* has been informed that Midcal does not intend to discuss in its brief the temperance data and anti-loss leader statutes on which the *Rice* decision turned. These matters are important because they show that in seeking to accommodate conflicting state and federal interests in *Rice,* the California Supreme Court was weighing the strong federal policy of enforcing the Sherman Act against a state law that had utterly failed to achieve its principal purpose of promoting temperance, and was an unnecessarily broad means of achieving its secondary purpose of protecting small retailers. All of the relevant data on these issues are discussed herein.

For all of the reasons above, the motion of Consumers Union to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

The interest of *amicus curiae* Consumers Union is set forth in the accompanying motion for leave to file this brief.

Questions Presented

1. Is the "state action" exemption of *Parker v. Brown* available when, as in this case, the State compels private parties to fix the wholesale and retail prices of a commodity but exercises no independent review over these pricing decisions?

2. Does a State have plenary power under section two of the 21st Amendment to legislate with respect to liquor in disregard of all federal statutes enacted pursuant to the Commerce Clause, or must state liquor legislation that conflicts with the federal antitrust laws be evaluated against them to determine which law should prevail?

3. Did the California Supreme Court correctly accommodate state and federal interests when it held in *Rice* that the California liquor fair trade law failed to achieve its principal purpose of promoting temperance and was an unnecessarily broad means of protecting small retailers, and must therefore fall before the paramount national policy embodied in the Sherman Act?

SUMMARY OF ARGUMENT

Each aspect of the California Supreme Court's decision in *Rice* was correct, and because the decision below was based entirely upon *Rice,* it should be affirmed.

Rice was correct when it ruled that the State's fair trade laws for liquor are not immunized from antitrust attack by the "state action" doctrine of *Parker v. Brown,* 317 U.S. 341 (1943). In order to obtain "state action" immunity, any private person relying upon state law must, under the decisions of this Court and the lower federal courts, satisfy three tests. First, the private anticompetitive conduct at issue must be compelled by the State; it is not enough that the State contemplates or encourages such conduct. Second, the conduct compelled must be in furtherance of a clear state policy; it is not enough if the State acquiesces in a program for which the real impetus comes from private parties. Third, the State must actively review the private conduct; it is not sufficient if the State compels anticompetitive acts but retains no supervision over their substance. While the statutes at issue here arguably satisfy the first two of these tests (although there is evidence that both the Legislative and Executive branches in California do not wish to enforce and no longer enforce fair trade), they clearly do not satisfy the third. The fair trade laws for wine, like those for liquor, contain no mechanism for review by the State of the prices set by producers.

California's wine fair trade laws also cannot escape invalidation by reliance upon section two of the 21st Amendment. The 1933 Congressional debates over the language that became the Amendment show that the sole purpose of section two was to insure that the "dry" States would remain "dry" by writing into the Constitution the language of the Webb-Kenyon Act. There is no evidence that the Amendment was intended to do anything more than overrule the decisions by which this Court in the 19th Century gradually eroded, through the Commerce Clause, the States' power to legislate with respect to liquor.

This Court's decisions construing the 21st Amendment are consistent with the Amendment's legislative history. They recognize that where a State seeks to limit importation or improper diversion of alcoholic beverages through means that would offend traditional Commerce Clause notions, it has broad power to do so. However, this Court has always reserved decision over the issue of whether state liquor legislation can prevail when it conflicts with the Sherman Act, and its decisions

suggest that when such a conflict arises, it must be resolved through an accommodation of state and federal interests like that reached in *Rice.*

The accommodation process used by the California Supreme Court in *Rice* was constitutionally sound, and the result reached under it was supported by the evidence. In holding that it must consider not only the State's purposes but also its means of achieving them, the California Supreme Court was merely acknowledging the reality that although the promotion of temperance is said to be liquor fair trade's principal goal, the evidence is that per capita consumption of alcoholic beverages has steadily increased in the State for more than 25 years, and that the increase has been especially dramatic in the case of wine. Further, in holding that it could properly consider whether less anticompetitive means were available to achieve the State's secondary purpose of protecting small retailers, the Court in *Rice* used an analysis that is well-established in other areas of constitutional law and that correctly anticipated what would happen in the marketplace. As the Director of California's Department of Alcoholic Beverage Control has testified, there is no evidence to suggest that a single small retailer has had to go out of business as a result of the *Rice* decision, or that the value of the retailers' licenses has declined. Finally, the California Legislature has recently enacted a bill that will enable small liquor retailers to form buying cooperatives, and thus take advantage of the quantity discounts now available only to their larger competitors.

There is nothing that can be said in defense of California's fair trade laws for alcoholic beverages. They compel a *per se* violation of the Sherman Act, have eliminated interbrand competition, do not promote

temperance, and are an unnecessarily broad means of protecting small retailers. For all of these reasons, the Court below and the California Supreme Court in *Rice* ruled correctly when they invalidated these laws.

ARGUMENT

I. THE "STATE ACTION" DOCTRINE DOES NOT IMMUNIZE CALIFORNIA'S WINE FAIR TRADE LAWS AGAINST A SHERMAN ACT ATTACK, BECAUSE THERE IS NO INDEPENDENT REVIEW BY THE STATE OF THE PRICES SET BY WINE PRODUCERS.

In *Rice v. Alcoholic Beverage Control Appeals Board,* the California Supreme Court carefully reviewed this Court's decisions on the "state action" exemption and concluded that the exemption did not apply to the State's liquor fair trade laws. *Rice* acknowledged that two of the three conditions for exemption laid down by this Court had been met, because (1) the State clearly compelled the conduct at issue, as required by *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), and (2) the fixing of retail prices was not merely acquiesced in by the State, but carried out a clear state policy, as required by *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). Nonetheless, the Court held that the exemption was unavailable because the State did not exercise any review over the prices set by producers. Noting that such independent review had been present in both of the cases in which this Court held the "state action" exemption to apply, *Parker v. Brown,* 317 U.S. 341 (1943) and *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the California Supreme Court said:

> [T]he state plays no role whatever in setting the retail prices. The prices are established by

> the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state policy . . . [W]e would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold . . . that this scheme is immune from the Sherman Act. 21 Cal.3d at 445.

Petitioner challenges this ruling. It contends that in view of the statement of policy contained in section 24749 of the California Business and Professions Code,[1] the fact that price posting is required by state law and is part of a complex regulatory scheme is enough, without more, to bring California's wine price posting laws within the "state action" exemption.

This contention is plainly wrong. It has been clear since this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), that a state law which compels private anticompetitive conduct is not beyond the reach of the Sherman Act. Of course, as respondent has shown in its memorandum on the California Attorney General's *amicus curiae* brief,[2] there is a serious issue in this case whether the State of

[1]Section 24749 is quoted in full on page 45 of petitioner's opening brief. It provides that liquor fair trade laws are necessary "for the purpose of fostering and promoting temperance," and to "eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof."

[2]Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness, filed November 26, 1979 (hereinafter referred to as "Respondent's Memorandum re Attorney General").

California can any longer be said to compel wholesale and retail price posting for wine. Even if the State still does compel such conduct, however, it is clear from this Court's decisions that the "state action" exemption does not apply. These decisions teach that "state action" immunity is available only where, in addition to compelling private conduct, the State has also created a mechanism to provide independent and meaningful review of that conduct so as to insure that federal antitrust policy is not unnecessarily subordinated to state goals. Because the statutes at issue here do not provide for such review, they are not entitled to a "state action" immunity.

A. The Failure Of The State To Seek Review Of Cases Striking Down Fair Trade, And The Decision Of The Legislature To Eliminate Funding For Fair Trade Enforcement, Raise Serious Doubts About Whether Fair Trade Continues To Be Part Of California's Alcohol Control Policies.

As the Respondent has pointed out in its Memorandum re Attorney General, California's wine fair trade laws come before this Court with an unusually complex procedural history.

First, the petitioner here is not the Department of Alcoholic Beverage Control ("ABC"), the state agency charged with enforcing the laws, but a private trade association that represents less than one-half of California's liquor retailers.[3]

[3]The petition for a writ of certiorari states that petitioner represents "over 3000 independent retail liquor establishments" (page 9). The State of California has about 11,000 retail liquor store licenses outstanding. Respondent's Memorandum re Attorney General, App. B, page 4.

Second, the ABC has not sought review of another decision by the California Court of Appeal in which the laws at issue here were held invalid on antitrust grounds.[4] Thus, the ABC's inaction, in addition to raising a serious issue of collateral estoppel, shows that the Executive branch of the California State government has no desire to enforce liquor fair trade.

The Executive branch is not alone in this respect. Within two weeks after the California Supreme Court's decision in *Rice,* the State Legislature eliminated $115,000 from the ABC's budget and specified that no state funds were to be spent in enforcing the laws that *Rice* had declared invalid. See *Analysis of the Budget Bill of the State of California for the Fiscal Year July 1, 1979 to June 30, 1980* (Report of the Legislative Analyst to the Joint Legislative Budget Committee) page 219; 1978 Cal. Stats. Ch. 359, §2, item 132, page 29.

We submit that in view of this substantial hostility to fair trade, California can no longer be said either to compel wine price posting, or to deem it central to the State's policies of alcohol control.

The only decision of this Court to consider a similar issue is in accord with our view. In *Cantor v. Detroit Edison Co., supra,* the Court was called upon to decide whether the State of Michigan had any policy with respect to competition in the lightbulb market. The Court concluded the State did not, for even though Michigan did require compliance with the tariff in which Detroit Edison's lightbulb program was included, no

[4]*Capiscean Corp. v. Alcoholic Beverage Control Appeals Board,* 87 Cal. App. 3d 996 (1979). The full text of this decision is annexed to the petition for a writ of certiorari as Appendix D.

state statute supported the practice, and the Michigan Legislature had never conducted an investigation of or made findings about the adequacy of competition in the lightbulb market. 428 U.S. at 584-585. Thus, *Cantor* teaches that in determining whether a State truly compels anticompetitive private conduct, one should look to the totality of the State's actions in an area, and not merely to the applicable statutes.

Once the totality of the State's actions is examined here, we think it clear that this case does not really present a "state action" issue.

B. California's Decision To Compel Wine Producers To Set Prices For Their Products Is Not Enough, Standing Alone, To Exempt The Price Posting Laws From Antitrust Scrutiny.

Even if section 24749 of the Business and Professions Code can still be accepted as a valid statement of California's current policy on fair trade for wine, it is nonetheless clear that petitioner's principal "state action" argument is without merit. This Court has long rejected the contention that a state law is immune from challenge under the Sherman Act merely because it *compels* anticompetitive conduct by private parties, and petitioner has suggested no reason why this holding should be reconsidered.

The first decision to reject petitioner's compulsion argument was *Schwegmann Bros. v. Calvert Distillers Corp., supra.* In that case, the issue before the Court

was the validity of Louisiana's "non-signer" fair trade law. The statute's validity had been challenged by a Louisiana retailer, who contended that the non-signer provision was in conflict with the Sherman Act. This Court agreed, holding that the non-signer provision, by compelling the retailer to adhere to a fixed price to which it had not agreed, went well beyond the limited exemption for fair trade laws granted by Congress in the Miller-Tydings Act.

In his opinion for the Court, Mr. Justice Douglas stressed that if the Louisiana non-signer law were upheld, it would allow distributors to enforce a scheme of horizontal price-fixing at the retail level, even though horizontal price fixing was expressly excluded from the anticompetitive arrangements made lawful by the Miller-Tydings Act. Mr. Justice Douglas did not believe that this horizontal price fixing was made any less objectionable by the fact that it was brought about through the compulsion of state law rather than through actual agreement among retailers. Citing *Parker v. Brown, supra,* Mr. Justice Douglas said:

> [W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . . [W]hen retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso [of the Miller-Tydings Act] which forbids "horizontal" price fixing. 341 U.S. at 389 (citations omitted).

If there was any doubt after *Schwegmann* that state law compulsion is not enough to exempt private conduct from scrutiny under the antitrust laws, that doubt was dispelled in *Cantor v. Detroit Edison Co., supra.* In that case, the defendant public utility argued that its pro-

gram of distributing lightbulbs to customers without making a separate charge enjoyed a "state action" immunity because the program was set forth in a tariff of the Michigan Public Service Commission, which defendant was *obliged* to follow. In support of its argument, the defendant relied upon the same language in *Goldfarb v. Virginia State Bar* relied upon by petitioner in this case, namely the passage that

> the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. 421 U.S. at 790.

The *Cantor* Court rejected the compulsion argument. The plurality opinion, after noting that "this Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted *or required* by state law," 428 U.S. at 600 (emphasis supplied), concluded that the defendant had read *Goldfarb* too broadly. Noting that compulsion was described in *Goldfarb* as the "threshold inquiry" of "state action" analysis. Mr. Justice Stevens said:

> Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity. *Id.*

Mr. Justice Blackmun's concurring opinion in *Cantor* reached the same conclusion. Relying expressly upon *Schwegmann,* he said:

> It cannot be decisive . . . simply that a state law goes so far as to require, rather than simply to authorize, the anticompetitive conduct in question. The Court accepted this as a prereq-

> uisite to antitrust immunity in *Goldfarb* . . . but it alone cannot be sufficient. The whole issue in *Schwegmann* was whether the State *could* require obedience to a fixed resale price arrangement. *Id.* at 609 (citations omitted).

This Court's rejection of compulsion as a sufficient condition for "state action" immunity finds ample support from academic commentators. As one of them said in reviewing *Cantor:*

> Compulsion would be a singularly inappropriate test for antitrust immunity. Most important, if compulsion were itself sufficient to justify an antitrust exemption, a state could simply order its citizens to violate the Sherman Act without providing alternative safeguards for antitrust interests, thereby vitiating the policies served by the federal statute. Note, "The Supreme Court, 1975 Term," 90 HARV. L. REV. 1, 236 (1976).

C. California's Failure To Provide For Independent State Review Of The Prices Set By Wine Producers Precludes Application Of The "State Action" Exemption In This Case.

Although this Court has explored the contours of the "state action" exemption five times within the past four years,[5] it has not yet ruled upon the question presented in this case: whether state law that compels private anticompetitive conduct is exempt from the reach of the

[5] *Goldfarb v. Virginia State Bar, supra; Cantor v. Detroit Edison Co., supra; Bates v. State Bar of Arizona, supra; City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

Sherman Act if it fails to provide for meaningful independent review by the State of that conduct.

Although the issue has not been directly addressed in this Court before, it has been considered many times by the lower federal courts and by academic commentators, and there is a rare agreement among them that without independent state review, the "state action" exemption should not apply. In their recent treatise on the law of antitrust, Professors Turner and Areeda have provided an excellent summary of why independent state review should be required in cases where the State compels private parties to engage in conduct that would otherwise violate the antitrust laws:

> The adequate supervision requirement responds directly to the federalism concerns that are at the core of *Parker.* It also reflects an attempt to reconcile those concerns with the policies behind the Sherman Act. The basic premise of the antitrust laws is that the market should both direct and constrain private behavior. To that end, competition must be robust, and free of anticompetitive restraints. On the other hand, the antitrust laws provide no basis for distinguishing those areas of the economy where the market should be allowed to direct economic activity from those where other concerns warrant public control. The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the

> Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market. P. Areeda and D. Turner, I ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶213, p. 73 (1978) (footnotes omitted).

Other academic commentators have reached the same conclusion for the same reasons. *See* Posner, "The Proper Relationship Between State Regulation and the Federal Antitrust Laws," 49 N.Y.U. L. REV. 693, 720-723 (1974); Handler, "Antitrust – 1978," 78 COLUM. L. REV. 1363, 1381 (1978); Note, *"Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor,* and *Bates,"* 77 COLUM. L. REV. 898, 916 (1977); Note, "The Supreme Court, 1975 Term," 90 HARV. L. REV. 1, 237 (1976).

The California Supreme Court's opinion in *Rice* bears eloquent witness to the need for independent state review. As indicated by the price data the Court considered, liquor fair trade in California had resulted by 1978 not only in the elimination of intrabrand competition, but in the virtual extinction of competition between brands as well. 21 Cal.3d at 454-456. This kind of price-fixing is precisely the evil at which the antitrust laws are aimed, and the only way to avoid it is by requiring that when prices are set under the auspices of state law, the prices are reviewed by the State to insure that the values served by the antitrust laws are not unnecessarily sacrificed.[6]

[6]Because California's liquor fair trade laws provide no mechanism of any kind for review of the prices set by producers, this case does not present the question of how active and extensive the State's supervision must be. This issue is one on which the academic commentators have divided sharply. *Compare* Posner, *supra,* at 49 N.Y.U.L. REV. 723-726 (favoring remand to state administrative agencies that have not carefully evaluated the antitrust implications of their decisions) with P. Areeda and D. Turner, *supra* ¶213c, pp. 75-76 (eschewing inquiry into the adequacy of the State's supervision unless it is so slight as to constitute an evasion of the antitrust laws). Consumers Union believes that "state action" immunity should not be granted unless the State's review is meaningful, and more than a rubber-stamp for private decisionmaking.

The need for independent state review of private anticompetitive conduct has been a theme running through all of this Court's "state action" decisions. In *Parker v. Brown, supra,* for example, Chief Justice Stone pointed out that the raisin marketing plan at issue in the case had been put into effect only after a state commission, the Agricultural Prorate Advisory Commission (whose members were appointed by the Governor and confirmed by the State Senate), had held public hearings and made findings of fact that institution of the marketing program would not result in excessive profits to raisin producers. 317 U.S. at 346. The Court relied heavily upon this extensive state involvement in holding that the raisin marketing plan was exempt from scrutiny under the Sherman Act.

In *Cantor v. Detroit Edision Co., supra,* the need for independent state review was met because the defendant utility was carefully regulated by the Michigan Public Service Commission. This Court denied a "state action" immunity not because the State failed to supervise, but because the State did not have a policy of replacing competition with regulation in the lightbulb market. However, Mr. Justice Blackmun's concurring opinion in *Cantor* considered the general circumstances under which state laws should be exempt from the reach of the Sherman Act. He concluded that a "particularly strong

justification" exist for a "state action" exemption when a State chooses to substitute its own regulation for the forces of competition and *actively supervises* the private conduct that it compels. See 428 U.S. at 611.

Of all this Court's recent decisions, *Bates v. State Bar of Arizona* speaks most clearly to the issue of independent state review. The case is particularly significant because its procedural posture was very much like that in this case; i.e. a direct challenge to state law uncomplicated by the troublesome question of whether a private party who merely obeys state law can be held liable for treble damages.

In *Bates,* the Court began its "state action" discussion by observing that the "threshold" test for immunity was met because the anti-advertising rule at issue was the "affirmative command" of the Arizona Supreme Court, the ultimate body wielding the State's power over the practice of law. Thus, in *Goldfarb's* words, the rule was "compelled by direction of the State acting as sovereign." 433 U.S. at 360.

After finding compulsion, *Bates* went on to discuss two arguments raised by petitioners that were based upon *Cantor.* The first was that the anti-advertising rule was based upon the American Bar Association's Code of Professional Responsibility, and should not be immune from challenge merely because the organized bar had been successful in persuading the Arizona Supreme Court to adopt it. This Court rejected the argument because the petitioners' claim was clearly against the State, and the degree of private influence on the State's decision was irrelevant. *Id.* at 361.

The second argument in *Bates* based upon *Cantor* was that the rule should be subject to antitrust challenge

because it was not "tailored so as to intrude upon the federal interest to the minimum extent necessary." *Id.* This Court rejected that argument for two reasons. First, the rule involved the competence and integrity of the bar, a matter of obvious state concern, and was "a clear articulation of the State's policy with regard to professional behavior." *Id.* at 362. But equally important, the rule's application was subject to continuous review by the Arizona Supreme Court. Emphasizing this last point, *Bates* said:

> [T]he rules are subject to pointed re-examination by the policymaker — the Arizona Supreme Court — in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active. *Id.*

As the California Supreme Court held in *Rice,* California's fair trade laws for alcoholic beverages are noteworthy precisely because they lack "active supervision" by the State or any opportunity for "pointed reexamination" by state officials to determine whether the laws serve their purported goals. State approval is not required before the prices fixed by producers go into effect, the prices are not subject to modification by the ABC or any other state agency, and state officials lack the power even to establish maximum or minimum prices.[7] The fair trade laws for wine are even more rigid

[7]Only the California Unfair Practices Act (Business and Professions Code Sections 17043-17044), which generally prohibits a retailer from selling merchandise below acquisition cost plus a six percent markup, appears to place any floor under retail liquor prices.

than those for distilled spirits, because they authorize producers to set wholesale as well as minimum retail prices. A scheme more conducive to antitrust law violations is difficult to imagine.

When the lower federal courts have been asked to rule upon statutes like those described in the preceding paragraph, they have invalidated them because of the lack of supervision and review by independent government officials. In *Norman's on the Waterfront, Inc. v. Wheatley,* 444 F.2d 1011 (3d Cir. 1971), for example, the Third Circuit invalidated the liquor fair trade law of the Virgin Islands because the Territory had provided no mechanism for review of the wholesale and retail prices set by liquor producers.[8] In holding that the Virgin Islands statute was not entitled to a "state action" exemption, the Third Circuit emphasized that the Territorial liquor authority had "no power to approve, disapprove, or modify the prices fixed by private persons." 444 F.2d at 1018.

Similarly, in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959), the Fourth Circuit rejected a claim that anticompetitive actions taken by a tobacco buyers' board-of-trade were immune from challenge by the Federal Trade Commission merely because the board had been established under state law. The Court pointed out that the board's members were not state officials, but private tobacco traders in competition with each other. Holding that private conduct must be "adequately supervised by independent state officials", and that anticompetitive conduct is justifiable only when it is "state action, not

[8]The Virgin Islands statute was very similar to that at issue in *Rice* and in this case. See 444 F.2d at 1013.

individual action masquerading as state action," the Court denied antitrust immunity. 263 F.2d at 509.

See also, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir.) *cert. denied* 400 U.S. 850 (1970) ("state action" immunity is appropriate only when "government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation"); *Gas Light Co. v. Georgia Power Co.,* 440 F.2d 1135 (5th Cir. 1971), *cert. denied* 404 U.S. 1062 (1972) (immunity granted where the programs at issue had been ordered into effect only after adversary hearings before and modification by the Georgia Public Service Commission); *Allstate Insurance Co. v. Lanier,* 361 F.2d 870 (4th Cir.), *cert. denied* 385 U.S. 930 (1966) (immunity granted where auto insurance rates suggested by a rating bureau had been approved by the State Insurance Commissioner and were subject to modification by him).

Clearly, the California Supreme Court in *Rice* and the court below in this case acted in accordance with the overwhelming weight of authority when they held that California's liquor fair trade laws cannot find shelter under a "state action" umbrella. The authorities on which these courts relied are sound, for they strike a reasonable balance between the States' need to regulate particular industries and the public's interest in ensuring that the values protected by competition are not trampled upon in the name of regulation. For all of these reasons, the ruling below on the "state action" issue should be affirmed.[9]

[9]Because the "state action" exemption is unavailable here, California's fair trade laws for alcoholic beverages are subject to scrutiny under the Sherman Act. When Congress repealed the Miller-

II. SECTION TWO OF THE 21ST AMENDMENT DOES NOT CONFER POWER UPON THE STATES TO ENACT LIQUOR LEGISLATION WITHOUT REGARD TO THE SHERMAN ACT, BUT REQUIRES INSTEAD THAT AN ACCOMMODATION BE REACHED BETWEEN THE STATE'S INTEREST IN ENFORCING ITS LIQUOR LAWS AND THE FEDERAL INTEREST IN ENFORCING THE SHERMAN ACT.

Petitioner and the *amici curiae* supporting its position have devoted substantial portions of their briefs to an attack upon the discussion of the 21st Amendment in *Rice*. They appear to argue that section two of the 21st Amendment[10] confers upon the States power to legislate with respect to liquor in total disregard of *all* legislation enacted by Congress pursuant to the Commerce Clause (U.S. Const., Art. I, Sec. 8, cl. 3). Thus, they continue, it was improper for the California Supreme Court to consider whether the State's resale price maintenance laws for liquor are in conflict with the Sherman Act, or to attempt any method of resolving this conflict.

Despite their extensive discussion of the legislative history of the 21st Amendment, the Webb-Kenyon and

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Tydings and McGuire Acts in 1975 (Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801), it restored the rule that vertical resale price maintenance arrangements are a *per se* violation of section 1 of the Sherman Act. As respondent Midcal demonstrates in its brief, Congress intended no exception from this rule for alcoholic beverages, and resale price maintenance laws for liquor can therefore escape invalidation only if they are based upon a legitimate use of state power under the 21st Amendment. That issue is considered in Parts II and III of this brief.

[10]Section 2 provides in full: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Wilson Acts, and the decisions of this Court construing the 21st Amendment, it is clear that petitioner and the *amici curiae* supporting its position are wrong. Read as a whole, the legislative history of the 21st Amendment shows that section two was included in the Amendment for the single, limited purpose of ensuring that the "dry" States would have the legislative power Congress believed they needed to remain "dry." In proposing the 21st Amendment for ratification by the States, Congress did *not* intend that in the event of conflict, state liquor legislation would automatically prevail over *any* federal statute enacted pursuant to the Commerce Clause, no matter how important it might be to national economic regulation.

It is equally clear from the decisions of this Court that state liquor legislation which conflicts with the antitrust laws does not automatically prevail over those laws. Since *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1944), this Court has expressly reserved decision over the question of whether such state legislation will be upheld. Other decisions of this Court recognize that in view of the limited purpose of section two, the proper method of resolving such a conflict is to accommodate where possible the State's interest in enforcing its liquor legislation with the strong federal interest in enforcing the Sherman Act. As shown in Part III of this brief, the California Supreme Court reached a reasonable accommodation in *Rice* because of its finding that the liquor fair trade laws frustrated the Sherman Act without doing anything to further the state policies behind them. Because the same frustration of federal goals and failure to achieve state goals is present with respect to wine fair trade laws, they must also be struck down.

A. The Legislative History Of The 21st Amendment Leaves No Doubt That The Sole Purpose Of Section Two Was To Allow The "Dry" States To Remain "Dry."

In recent years, several opinions from this Court have reviewed the legislative history of the 21st Amendment in order to determine its proper scope. These opinions have concluded that in offering section two to the States for ratification, Congress' primary purpose was to remove all doubt about the "dry" States' legal power to remain "dry" by writing into the Constitution the provisions of the Webb-Kenyon Act.[11] *Craig v. Boren,* 429 U.S. 190, 205-206 (1976); *California v. LaRue,* 409 U.S. 109, 134 (1972) (Marshall, J., dissenting). Academic commentators have reached the same conclusion. *See* Note, "The Twenty-First Amendment Versus the Interstate Commerce Clause," 55 YALE L. J. 815, 816-818 (1946).

A complete review of the Amendment's legislative history shows that this reading is correct. All of the members of Congress who spoke concerning section two during the debates agreed that it was designed to allow "dry" States to have the necessary legislative power to keep liquor out of their borders; there is no evidence to indicate that Congress intended section two to have any other effect.

Senator Blaine was the manager on the Senate Floor of Senate Joint Resolution 211, the Senate amendments to which included the language that was ultimately ratified as the 21st Amendment.[12] In his introductory remarks, Senator Blaine noted that the constitutionality of the Webb-Kenyon Act had been upheld by a divided Court in *Clark Distilling Co. v. Western Maryland R. Co.,* 242 U.S. 311 (1917), and that the purpose of section two of the Joint Resolution was to remove any doubt that might remain about the Act's constitutionality:

> [T]o assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write per-

[11]The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . ." 27 U.S.C. § 122.

[12]The Senate Judiciary Committee amended S.J. Res. 211 to read as follows:

> That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:
>
> "ARTICLE
>
> "SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> "SEC. 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
>
> "SEC. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." 76 Cong. Rec. 4138-4139.

> manently into the Constitution a prohibition along that line. 76 Cong. Rec. 4141.

Senator Blaine then elaborated further on why the Senate Judiciary Committee desired to include section two in the Amendment:

> The committee felt that since the Congress had acted and had definitely legislated upon this question [in the Webb-Kenyon Act], while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.
>
> I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States a full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors. *Id.*

Later during the Senate debate, Senator Fess stated his understanding of the meaning of section two:

> In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry. I am in favor of that. 76 Cong. Rec. 4168.

Shortly after Senator Fess spoke, Senator Robinson of Arkansas proposed an amendment to strike out section two. Senator Borah, a supporter of the Joint Resolution, opposed the motion, repeating the point that section two was the only sure way to remove doubt about

the constitutionality of the Webb-Kenyon Act. After noting that President Taft had vetoed the Act because of his belief that it was unconstitutional, and that many other fine lawyers had shared these views, Senator Borah said that without the language of section two,

> we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. 76 Cong. Rec. 4170.

Senator Borah then examined the Commerce Clause decisions by which this Court in the 19th Century had gradually eroded the States' power to legislate with respect to liquor, and urged once again that section two remain in the Amendment. Thereafter, Senator Robinson withdrew his motion to delete it. 76 Cong. Rec. 4171.

Aside from the discussion described above, the language of section two received little consideration in the Congressional debates.[13] No more was necessary, because the limited purpose of the section was clear. Instead, most of the time in both the House and Senate was spent on two other questions: (1) whether the Amendment should be ratified by state legislatures or conventions, and (2) whether section three of the Joint

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[13] Remarks about section two in the less extensive House debates tracked those in the Senate. *See, e.g.*, 76 Cong. Rec. 4518 (Rep. Robinson), 4526 (Rep. Tierney).

Resolution was necessary for the purpose of preventing the "return of the saloon."[14]

In its *amicus curiae* brief in support of petitioner, the Virginia Beer Wholesalers Association has placed heavy reliance upon remarks made during the Senate debate about section three of the Joint Resolution[15] to support the argument that section two of the Amendment gives the States power to enact legislation that conflicts with *any* federal statute based upon Congress' power to regulate interstate commerce. In taking this position, the Association is echoing similar statements made in the dissenting opinion in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), in which Mr.Justice Black argued that the deletion of section three showed that section two was designed to confer upon the States power to legislate without regard to normal Commerce Clause limitations.[16]

Opposing *amicus curiae* is wrong. It is evident that the fears expressed during the debates about section three

[14]In opposing the "return of the saloon," the members of Congress in 1933 were not describing bars as we know them today. Instead, they were opposed to the bars of the pre-Prohibition period, which were often owned by aggressive breweries or distillers and in which prostitution and gambling flourished on a scale unheard of now. *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies* (Program Review Branch), Audit Division, California Department of Finance (1974), pp. 3, 5-6. If the Court grants the motion to file this brief, copies of this report will be lodged with the Clerk for the convenience of the Court.

[15]As noted above, section three of S.J. Res. 211 provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."

[16]*See also Castlewood International Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir. 1979).

cannot operate to enlarge the limited power to remain "dry" that is granted the States by section two. As this Court observed in *Schwegmann Bros. v. Calvert Distillers Corp., supra,* the fears of the opponents of legislation — or of constitutional amendments — are not a reliable guide to construction. 341 U.S. at 394-395. The supporters of Joint Resolution 211 said again and again in the debates that section three was not intended to qualify the States' legislative powers under section two, but was included only for the purpose of giving Congress the residual power to outlaw saloons. *See,* e.g., 76 Cong. Rec. 4155 (Sen. Walsh), 4156, 4161, 4174 (Sen. Norris). Moreover, section three was deleted from the Amendment that was ultimately submitted to the States for ratification. The language of a provision deleted from a constitutional amendment cannot define the scope of language included in the amendment.

Because the legislative history makes it clear that section two of the 21st Amendment was designed only to allow the "dry" States to remain "dry," any support for the argument that section two confers "absolute" power upon the States to legislate in disregard of important federal laws passed under the Commerce Clause must come from the decisions of this Court, to which we now turn.

B. This Court's Decisions Under The 21st Amendment Recognize That State Liquor Legislation Is Not Automatically Valid If It Conflicts With The Sherman Act, But Must In Each Case Be Considered Against The Sherman Act To Determine Which Law Should Prevail.

In the first decade after ratification of the 21st Amendment, most of this Court's decisions construing the Amendment involved efforts by the States to limit the importation or improper diversion of alcoholic beverages by imposing license restrictions and taxes. In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), for example, the Court sustained a $500 annual license fee upon those who imported beer into California. Similarly, in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court upheld a Minnesota law that prohibited the importation into Minnesota of brands of liquor containing more than 25% alcohol unless they were registered with the U.S. Patent Office. And in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939), the Court sustained a Kentucky statute that denied a license to an interstate carrier who exported liquor from the State on the ground that the state law was reasonably calculated to prevent improper diversion of the liquor into Kentucky.

It was not until 1944, in *United States v. Frankfort Distilleries, Inc., supra,* that the Court considered a contention that the Sherman Act was in conflict with state liquor legislation and must give way to it. The United States had indicted a group of liquor wholesalers, retailers, and producers located in Colorado, who were charged with having agreed among themselves to fix and increase wholesale and retail liquor prices by entering into fair trade contracts, and by coercing others to do the same. This Court upheld the defendants' conviction on the ground that their activities were not authorized by the Colorado Fair Trade law, which permitted vertical agreements for resale price maintenance but forbade horizontal or coercive price fixing agreements. 324 U.S. at 299. The Court repeatedly emphasized that there was no conflict between the federal antitrust laws and the Colorado law.

In *Frankfort Distilleries,* both the opinion of the Court and the concurring opinion of Mr. Justice Frankfurter raised the question of what would happen in a case in which the Sherman Act was in actual conflict with state liquor legislation. In his concurring opinion, Mr. Justice Frankfurter hypothesized a case in which state liquor laws provided for resale price maintenance through horizontal agreement:

> If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its border either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. 324 U.S. at 301.

Mr. Justice Black's opinion for the Court was not willing to go so far. He cautioned:

> We . . . do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of mo-

ment which need not be decided until they are presented. 324 U.S. at 299.

Clearly, although Mr. Justice Frankfurter thought it self-evident that laws of the kind at issue in this case should be sustained,[17] a majority of this Court reserved decision on the question.

The Court was not confronted with another claim of conflict between the Sherman Act and state liquor legislation until *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966). In that case, liquor distillers, wholesalers and importers mounted a broad-based constitutional attack on the newly-enacted New York affirmation statute. One of the plaintiffs' contentions was that the affirmation statute was invalid under the Supremacy Clause (U.S. Const., Art. VI) because the state law conflicted with the Sherman Act and the Robinson-Patman Act. Writing for the Court, Mr. Justice Stewart rejected the argument because he found that the New York law did not actually require any conduct forbidden under the Court's antitrust decisions. 384 U.S. at 45-46. However, he also noted that the statute was challenged on its face, and that circumstances could be envisioned under which the statute as applied would compel violations of the Robinson-Patman Act. *Id.* at 46. He concluded that the Court would deal with such conflicts if and when they arose. *Id.* at 52.

Both petitioner and the Virginia Beer Wholesalers Association claim to find support for their position in *Seagram,* and especially in its statements that "the Twenty-first Amendment demands wide latitude for regulation by the State" (384 U.S. at 42), and (quoting

[17]At least before repeal of the Miller-Tydings and McGuire Acts.

Hostetter) that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.*

A careful reading of the *Seagram* case discloses that it will not support the interpretation that petitioner and *amicus* place upon it. First, if it were true that state liquor legislation automatically prevails over the federal antitrust laws in a case in which the two statutory schemes conflict, it would have been pointless for the *Seagram* Court to consider whether, in fact, the affirmation statute compelled antitrust law violations. Second, the passage about the States being "totally unconfined by traditional Commerce Clause limitations" appears *not* in the portion of the opinion that discussed the Sherman Act, but in that section which considered whether the affirmation statute unduly burdened interstate commerce.

We submit that it is no accident this language appears in one section of the opinion and not the other. For as we have shown in the discussion of the 21st Amendment's legislative history, Congress intended section two of the Amendment to exempt States seeking to remain "dry" from the "traditional Commerce Clause limitations" by which this Court in the 19th Century had reduced the States' power to legislate with respect to liquor.[18] When the Amendment was ratified in 1933, the antitrust laws could not have been considered such a "traditional Commerce Clause limitation," because this Court had not yet finished developing the "affection"

[18]Consumers Union has been informed that these decisions and the Commerce Clause theory supporting them will be reviewed in detail in respondent's brief.

theory of interstate commerce by which the Sherman Act's scope has been expanded.[19]

C. *Rice* Correctly Held That in Cases Where State Liquor Legislation And The Sherman Act Conflict, The 21st Amendment Requires That Each Statute Be Evaluated In The Light Of Its Purposes And Its Efficacy In Achieving Them, And That The Most Important Interest Be Allowed To Prevail.

Although it is clear from the decisions in *Frankfort Distilleries* and *Seagram* that state liquor legislation does not automatically prevail in the event it conflicts with the Sherman Act, those cases do not suggest how such a conflict should be resolved. When the California Supreme Court was confronted with this question in *Rice,* it looked to other 21st Amendment decisions (including its own in *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1 (1971)), which it read as sanctioning a process of accommodation, in which the purposes behind the state and federal laws are considered, a judgment is made as to whether the laws are effective in achieving their purposes, and the most important interest is allowed to prevail.

The first decision to suggest such an analysis was, of course, *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra.* In that case, the issue was whether the State of New York could prohibit the plaintiff from engaging in its business of selling liquor to New York airline

[19] ***Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 743 n.2 (1976); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 229-235 (1948); *Wickard v. Filburn,* 317 U.S. 111, 118-129 (1942).**

passengers bound for foreign destinations. The liquor was delivered to the passengers only after their arrival in the foreign countries.

This Court held that the New York liquor licensing statute could not be used to prohibit this arrangement, because to do so would interfere with the plaintiff's right to engage in business under laws administered by the United States Bureau of Customs, laws that had been enacted pursuant to the Commerce Clause. The Court rejected New York State's argument that section two of the 21st Amendment had worked a "repeal" of the Commerce Clause. After discussing a number of the cases decided in the years immediately after ratification, the Court said:

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be *an absurd oversimplification.* If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. *Such a conclusion would be patently bizarre and is demonstrably incorrect. . .*
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. 377 U.S. at 331-332 (citations omitted; emphasis supplied).

Because this Court has not faced a conflict like that in *Rice* until now, it has not had occasion to engage in the

accommodation process suggested by *Hostetter*. But the Court's recent decision in *Craig v. Boren, supra,* makes it clear that in an appropriate case, the Court would use such an analysis. In *Craig,* Mr. Justice Brennan's opinion for the Court reviewed the decisions under the 21st Amendment and, citing *Hostetter,* said:

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. . . . Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 429 U.S. at 205-206 (footnotes and citations omitted).[20]

Neither *Hostetter* nor *Craig* suggests how the accommodation process works in a case where state liquor legislation conflicts with the Sherman Act. However, it seems clear that the process must begin, as *Rice* held,

[20]Both petitioner and the Virginia Beer Wholesalers Association argue that this Court's summary affirmance of the decision in *National Railroad Passenger Corp. v. Miller,* 358 F. Supp. 1321 (D.C. Kan.), *aff'd.* 414 U.S. 948 (1973) indicates an abandonment of the accommodation process referred to in *Hostetter* and *Craig*. This contention is incorrect, because the District Court in that case held that there was no conflict between the Rail Passenger Act and the Kansas Liquor Control Act. 358 F. Sup. at 1329. Without a direct conflict between state and federal law, there is no need for accommodation, and the *National Railroad Passenger Corp.* case therefore has no bearing on the issues here.

with an inquiry into the purposes purportedly served by the state and federal statutes. 21 Cal.3d at 451. In this case, that is neither a difficult nor a subjective exercise, because statutes and judicial decisions clearly define the purposes of the Sherman Act and California's fair trade laws for alcoholic beverages. As *Rice* noted, section 24749 of the Business and Professions Code defines the purposes of liquor fair trade as the "promotion of temperance" and the elimination of "price wars which unduly stimulate the sale and consumption of alcoholic beverages."

The purposes of the Sherman Act and its importance to our national economy are clearly defined by decisions of this Court. As the Court said in *United States v. Topco Associates,* 405 U.S. 596, 610 (1972), the Sherman Act is "the Magna Carta of free enterprise," and is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." The purpose of this vital statute was further elucidated in *Northern Pacific R. Co. v. United States,* 356 U.S. 1 (1958). In that case, this Court emphasized that the Sherman Act is

> aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. 356 U.S. at 4.

The California Supreme Court was correct in holding that where such an important national policy is concerned, the accommodation process cannot end with an inquiry into the purposes behind the conflicting state and federal statutes. Instead, a reviewing court must also ask how well the statutes carry out their respective purposes. This Court used such an approach in *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951), in which the issue was whether a Madison, Wisconsin ordinance that placed restrictions on who could sell milk with the city was an undue burden on interstate commerce. The Court assumed that a milk licensing ordinance could be a valid exercise of the city's police power, but it rejected the argument that the ordinance must be upheld if its purpose was permissible. Instead, the Court said, it was necessary to determine the practical effects of the ordinance, and whether the city's purpose could be achieved by less drastic means. 340 U.S. at 354.

Consideration of how well the state and federal statutes serve their respective purposes is also suggested by Mr. Justice Stewart's concurring opinion in *California v. LaRue, supra.* Although acknowledging that section two gives the States broad power to legislate with respect to liquor, Justice Stewart cautioned that the Amendment does not empower a State "to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders." 409 U.S. at 120, n.* Deciding whether a State has done that requires, in most cases, that the practical effects of a liquor statute be considered, and that a determination be made as to whether it is reasonably calculated to achieve its declared ends.

When read "in the context of the issues and interests at stake," the California Supreme Court's decision in

Rice on the scope of the 21st Amendment is a carefully limited one. It requires only that where state liquor legislation clearly contravenes important national economic policies such as the Sherman Act, the State cannot use the Amendment as an absolute shield, but must demonstrate that its laws are effective in achieving temperance or some other state goal reasonably related to the original purpose of the Amendment.

With this holding and method of accommodation in mind, we turn to the question of whether, in this case and in *Rice,* a proper accommodation was reached between the Sherman Act and California's fair trade laws for liquor.

III. *RICE* WAS CORRECT WHEN IT CONCLUDED THAT THE SHERMAN ACT MUST PREVAIL OVER CALIFORNIA'S FAIR TRADE LAWS FOR LIQUOR, BECAUSE THE LATTER STATUTES HAVE FAILED TO PROMOTE TEMPERANCE AND ARE AN UNNECESSARILY DRASTIC MEANS OF PROTECTING SMALL RETAILERS.

After concluding that the "state action" exemption was unavailable and that the 21st Amendment required an accommodation process, the California Supreme Court in *Rice* undertook the analysis described in the preceding section. It began by noting that the liquor fair trade laws resulted in a clear frustration of the Sherman Act because they compelled a violation of a *per se* rule, and because the evidence showed substantial uniformity of price among brands of liquor sold in the State. 21 Cal.3d at 453-456. The Court then asked whether the laws had helped to achieve either of the purposes stated for them in Business and Professions Code section 24749, the promotion of temperance and the prevention of "price wars." The Court concluded that the laws were

not reasonably calculated to achieve these ends, because there was *no* evidence to indicate that fair trade had helped to promote temperance, and because measures that did less violence to the Sherman Act were available to protect small liquor retailers from "price wars" and other predatory practices by large retail chains. 21 Cal.3d at 456-459.

As all parties in this case acknowledge, the judgment in *Rice* is long since final, and thus not subject to review by this Court. Even if *Rice* were now before the Court, however, we doubt that its resolution of the state-federal conflict would be subject to review, because that resolution turned upon questions of state law, as to which the California Supreme Court is the final authority. Nonetheless, because we believe that *Rice's* resolution of the conflict between the Sherman Act and liquor fair trade was sound, the final portion of this brief is devoted to a discussion of evidence relevant to the temperance issue, and to a discussion of developments since *Rice* in the marketplace and in the California Legislature. This evidence leaves no doubt that the California Supreme Court was correct in holding that fair trade has not promoted temperance, that less restrictive means are available to protect small retailers, and that the paramount national policy of competition embodied in the Sherman Act must therefore prevail.

A. The Evidence Is Clear That Liquor Fair Trade Laws Do Not Promote Temperance.

The decision by Consumers Union to participate as *amicus curiae* in *Rice* was not reached quickly, for in addition to its long-standing opposition to fair trade laws, Consumers Union has been concerned for many

years with the problems associated with alcohol abuse. The decision to participate was made when it became apparent that resale price maintenance laws for liquor have not prevented a substantial increase in per capita consumption of all types of alcoholic beverages, even though, as noted above, the promotion of temperance is declared by statute to be fair trade's principal purpose. Business & Professions Code section 24749.

The California Supreme Court extensively reviewed data on alcohol consumption in its decision. It cited the conclusions of a major investigation conducted by the California Senate,[21] as well as a 1974 study by the California Department of Finance which found that per capita consumption of distilled spirits in California had increased by 42% between 1950 and 1972.[22] The Court also noted that studies in other States, such as that conducted in 1963 by New York's Moreland Commission, had also found no correlation between liquor resale price maintenance laws and the promotion of temperance. 21 Cal.3d at 457-458.

Rice's conclusion about the ineffectiveness of fair trade in promoting temperance holds even more true for wine than for distilled spirits. The data considered by the California Supreme Court (and other evidence not before it) show that per capita increases in wine consumption have been many times greater than those for distilled spirits.

The point is well illustrated by a table that appeared in the Department of Finance study cited in *Rice*:

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[21]Senate Select Committe on Laws Relating to Alcoholic Beverages, ALCOHOLISM: A CALIFORNIA STATE SENATE REPORT, Vol. III, "The Alcoholic Beverage Industry," page 69.

[22]*Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, supra*, page 15.

APPARENT PER CAPITA CONSUMPTION OF ALCOHOLIC BEVERAGES: CALIFORNIA, 1950-1972[23]

(Gallons)

Year	Distilled spirits	Beer	Dry wine	Sweet wine	Sparkling wine
1950	2.6	21.8	0.9	2.0	0.04
1955	2.5	21.6	1.2	1.9	0.06
1960	2.8	22.5	1.5	1.7	0.09
1965	3.3	24.2	2.1	1.5	0.16
1970	3.6	26.9	3.3	1.1	0.33
1971	3.7	27.3	3.7	1.1	0.33
1972	3.7	28.4	4.1	1.1	0.35
Percentage Change (1950-1972)	+42%	+30%	+356%	−45%	+775%

The same conclusion was reached in research conducted at the School of Public Health at the University of California. A study there found that per capita increases in wine consumption exceeded the consumption increases for all other alcoholic beverages in California between 1952 and 1975, and did so although the price of wine generally kept pace with increases in the Consumer Price Index.[24]

[23]This table, which was derived from the Governor of California's Budget for 1973-1974, appeared on page 15 of *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, supra.*

[24]R. Bunce, *Alcoholic Beverage Consumption, Beverage Prices and Income in California 1952-1975* (Social Research Group, University of California-Berkeley School of Public Health, California Office of Alcoholism Report No. 6, 1976), pp. 7-8. If the Court grants the motion to file this brief, copies of this paper will be lodged with the Clerk for the convenience of the Court. We must point out that alcohol researchers are divided over the significance of per capita consumption statistics. Some argue that such figures are not significant because in any population, a large percentage of the alcohol sold is consumed by a relatively small number of people. But a growing number of researchers contend that per capita data *is* significant because consumption by heavy drinkers is proportional to per capita consumption. *See generally,* Schmidt and Popham, "The Single Distribution Theory of Alcohol Consumption: A Rejoinder to the Critique of Parker and Harman," 39 Q.J. Studies on Alcohol 400 (1978).

Undaunted by the statistics on per capital consumption, some defenders of fair trade have argued that it is a reasonable marketing system because the demand for alcoholic beverages is price-elastic (i.e. sensitive to price, so that an increase in price will bring about a corresponding decrease in consumption). The available data do not support such a sweeping generalization. Economists who have attempted to compute price elasticities for liquor have reached widely varying results,[25] and the only economist who has looked specifically at California has found the demand for liquor there to be quite *in*elastic with respect to price.[26]

In any event, alcohol researchers have become very cautious in recent years about placing much reliance on elasticity studies. They point out that long- and short-term elasticities differ, that demand elasticities for liquor are heavily influenced by fast-changing social and cultural trends, and that the values computed are no better than the data on which they are based.[27] At least

[25]A summary of price and income elasticities appears on page 6 of a study by the ABC entitled "Report to Joint Legislative Committees on Minimum Retail Price Posting" (January 1, 1977). If the Court grants the motion to file this brief, copies of this study will be lodged with the Clerk for the convenience of the Court.

[26]Simon, "The Price Elasticity of Liquor in the U.S. and a Simple Method of Determination," 34 *Econometrica* 198 (1966).

[27]E. Österberg, "The Pricing of Alcoholic Beverages As An Instrument of Social Policy," Social Research Institute of Alcohol Studies Report No. 83 (Helsinki, Filand, 1975). If the Court grants the motion to file this brief, copies of this report will

one economist who had concluded that the demand for liquor is price-elastic has changed his mind.[28]

Although consumption data and elasticity studies are significant, perhaps the most telling bit of evidence in *Rice* on the temperance issue came from the actions of the California Attorney General. Despite numerous opportunities to do so, he did not come forward with a single piece of evidence to support the temperance promotion rationale. We submit that if, after nearly 40 years of experience, the State cannot supply any evidence to support the main assumption on which liquor resale price maintenance is based, it has indeed exercised its powers under the 21st Amendment with "total irrationality." *Craig v. Boren* at 429 U.S. 215 (Stewart, J., concurring in the judgment).

B. As Recent Developments Have Shown, There Are Less Drastic Means Than Fair Trade For Protecting Small Retailers.

Events since mid-1978 have shown that the California Supreme Court was also correct in its holding that the other purpose of liquor resale price maintenance, the protection of small retailers, can be achieved by

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be lodged with the Clerk for the convenience of the Court. Mr. Österberg is not surprised that elasticity values vary because "elasticities are not inherent attributes of alcoholic beverages" (page 4). Thus, he is very skeptical about the use of price-fixing to control consumption. Pages 10-11. Baxter Rice, Director of the California ABC, also puts little stock in econometric studies. *See* Respondent's Memorandum Re Attorney General, App. B, page 12.

[28]*See* NEW YORK STATE MORELAND COMMISSION ON THE ALCOHOLIC BEVERAGE CONTROL LAW, Report and Recommendations No. 3, "Mandatory Resale Price Maintenance" (1964), pp. 20-21, 35-39 (statement of Professor Karl B. Marx).

methods other than fair trade. Contrary to the gloomy predictions of petitioner and others, large numbers of small retailers have not gone out of business since *Rice,* and (as discussed below) the California Legislature has recently enacted a statute that will authorize small retailers to form buying cooperatives. This measure promises to eliminate the disparities in purchasing power that have made it difficult for small liquor stores to compete with large retail chains.

In *Rice,* the California Supreme Court placed great emphasis upon the evidence that led Congress in 1975 to repeal the Miller-Tydings and McGuire Acts.[29] In particular, the Court was impressed by the finding that the failure rate among small businesses was 55% greater in fair trade States than "free trade" States, while the growth rate for small retailers had been 32% greater in States that had not enacted or had repealed fair trade laws. 21 Cal.3d at 456.

Experience in the marketplace since *Rice* confirms that the abolition of fair trade need not be fatal to small liquor stores. As Baxter Rice has recently testified, there is no evidence to indicate that a single retailer has gone out of business as a result of the California Supreme Court's decision. Moreover, the number of retail store license transfers is about the same, and the average price paid for these licenses has declined by no more than 10%.[30]

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[29]Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801 (1975).

[30]Respondent's Memorandum re Attorney General, App. B, pp. 3, 31-32. Appendix B contains the full text of the testimony Mr. Rice gave at hearings on liquor regulation held in New Jersey on February 9, 1979. This appendix will hereafter be referred to as the "New Jersey Hearings."

Consumers Union has not been surprised by these developments, because we argued throughout the *Rice* litigation that fair trade was not essential to the survival of "mom and pop" liquor stores. First, unlike many large retailers, "mom and pops" offer convenience, for which consumers will pay a premium. Second, as the California Supreme Court noted, California law contains ample prohibitions against "loss leader" sales practices by retail chains. 21 Cal.3d at 457 n. 24, 458. *See also* Business & Professions Code §24755(g). The abolition of fair trade has therefore not left small retailers without protection against predatory price cutting, and experience in the marketplace since *Rice* confirms that such "price wars" have not occurred. New Jersey Hearings, pp. 10-11.

One thing that did trouble Consumers Union during its involvement in *Rice* was the disparity in purchasing power between "mom and pop" stores and the large retail chains. Some of the State's major retailers (such as Safeway Stores and Thrifty Drugs) have as many as 400 retail liquor licenses. New Jersey Hearings, page 4. As a result, they alone are able to take advantage of the quantity discounts offered by California's liquor wholesalers, who will sell a case for several dollars less when a customer purchases 50 or more cases. Other students of the liquor industry have also been troubled by this disparity, and urged the California Senate as early as 1973 to enact legislation that would authorize small retailers to form cooperatives. The Senate Select Committee holding the hearings included a recommendation to that effect in its Final Report.[31]

[31]Senate Select Committee on Laws Relating to Alcoholic Beverages, *supra,* Vol. I p. 85, Vol. III p. 67. The interest in cooperatives was spurred by the success they have enjoyed in the grocery business, where group buying has allowed independent grocers to compete very effectively with the chains. *See United States v. Von's Grocery Co.,* 384 U.S. 270, 298-300 (1966) (Stewart, J., dissenting).

We are pleased to inform the Court that the California Legislature has recently enacted and the Governor has signed a bill adding section 24400 to the Business and Professions Code. This section will authorize retailers to form cooperatives beginning on January 1, 1980. The full text of the bill appears in Appendix A to this brief. While its ultimate success in equalizing purchasing power must await further developments, Consumers Union believes that the measure will go a long way in enabling the "mom and pops" to compete on a more equal footing with large retailers.

CONCLUSION

The decision below to strike down California's wine fair trade laws is correct and should be affirmed. As was the case in *Rice,* the laws have caused California consumers to pay excessively high prices for wine, and have done so without providing any countervailing social benefit in the form of reduced consumption.

By bringing the fair trade issue to this Court, petitioner is trying to turn back the clock. The evidence shows that *Rice* has introduced some much-needed competition into the California liquor market, and has done so without the dire consequences to small retailers that petitioner and others had predicted. Moreover, decisions by the California Legislature and the Governor show that they no longer want fair trade, and prefer instead to let all retailers compete on an equal footing.

In view of all that has transpired since *Rice,* the wine fair trade laws could escape invalidation only through a very broad application of the "state action" doctrine, or by an equally broad interpretation of the 21st Amendment. But as we have shown, the great weight of authority is against petitioner on the "state action" question, and the view of the 21st Amendment espoused by petitioner would expand that provision far beyond the intentions of the Congress that framed it. For these reasons and the others set forth above, the judgment below should be affirmed in all respects.

Respectfully submitted,

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APPENDIX A

Senate Bill No. 1084

CHAPTER 455

An act to add Section 24400 to the Business and Professions Code, relating to alcoholic beverages.

[Approved by Governor September 5, 1979. Filed with Secretary of State September 5, 1979]

LEGISLATIVE COUNSEL'S DIGEST

SB 1084, Carpenter. Alcoholic beverages.

Existing law prohibits an on- or off-sale alcoholic beverage licensee from purchasing alcoholic beverages for resale from any person other than a person licensed as a manufacturer, wine grower, rectifier, or wholesaler. Tied house restrictions contained in the Alcoholic Beverage Control Act prohibit retail licensees from also holding an interest in any other type of alcoholic beverage license.

This bill would authorize 2 or more alcoholic beverage retail licensees of the same type to agree to group purchase distilled spirits from a wholesaler or rectifier through a designated agent under specified conditions.

The people of the State of California do enact as follows:

SECTION 1. Section 24400 is added to the Business and Professions Code, to read:

24400. Notwithstanding any other provision of law, two or more retail licensees of the same type may agree to group purchase distilled spirits from a licensed

wholesaler or rectifier through a designated agent, subject to the following restrictions:

(a) The designated agent shall hold a retail license of the same type operating a premises in the same county or counties as the purchasing group.

(b) No retailer shall have more than one designated agent nor shall an agent make purchases for more than one group.

(c) The merchandise purchased for each group shall be delivered to and stored in either a single licensed premises or a single warehouse located in the same county as the premises of the purchasing group and such delivery shall be a single delivery within two consecutive business days at the discount in effect on the day the delivery was commenced. Saturday, Sunday, and holidays shall not be deemed business days.

(d) A record of purchase shall be made by the agent on a master purchase order. Each purchasing retailer shall furnish the designated agent with a signed order setting forth such licensee's purchase, to be attached to and become a part of the master order. Master and individual orders shall be maintained in compliance with Section 25752 and fiscal liability shall extend in so far as the amount of the purchase designated and delivered for each individual retailer of the purchasing group is subject to the provisions of Section 25509.

(e) The merchandise shall be deemed to have been deemed to have been received by each retailer member of the purchasing group when delivered to the designated premises.

(f) When a group buying member has not made payment in full by the expiration of the 30th day from date of delivery or has not paid the one percent charge at the expiration of the 30th day from the date the charge became due, such group buying member shall be expelled from the buying group and prohibited from rejoining that group or joining any other such group until such time that all payments have been received for the merchandise sold and delivered to such retailer more than 30 days previously.